BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

JOSEPH SETY, JR.,	)	
	)	
Appellant,	)	**PCHB No. 92-111**
	)	
v.	)	
	)	**FINAL FINDINGS OF FACT,**
STATE OF WASHINGTON,	)	**CONCLUSIONS OF LAW**
DEPARTMENT OF ECOLOGY,	)	**AND ORDER**
	)	
Respondent.	)	
	)	

This matter, the appeal of a civil penalty of $9,500 for violation of RCW 70.94.775(1) which prohibits burning of materials, including rubber tires, which normally emit dense smoke, came on for hearing before the Pollution Control Hearings Board on May 5, 1993, at Lacey, Washington. Respondent Department of Ecology elected a formal hearing pursuant to RCW 43.21B.230.

Appellant Sety represented himself (pro se). Respondent Department of Ecology was represented by Stephanie Delaney, Law Clerk, and Mary Sue Wilson, Assistant Attorney General. The proceedings were recorded by Lenore Schatz of Gene Barker and Associates, Olympia, WA. Witnesses were sworn and testified. From the testimony, exhibits and contentions, the Hearings Board , Chairman Harold S. Zimmerman, presiding; Robert V. Jensen, Attorney Member, and Richard C. Kelley, Member, deliberated and enters the following:

FINDINGS OF FACT

I

Joseph Sety Jr., W. 513 King Street. Chewelah, WA, 99109, has been storing tires since the 1970s, on property between one and two miles south of Chewelah on the east side of U.S Highway 395.

II

The property was owned by Mr. Sety until a few years ago, when it was transferred to Robert Summers for payment of a debt. However, Mr. Sety continued to use the property to store tires, even after Mr. Summer's death. Mrs Summers, the widow, apparently acquiesced in the use of the land by Mr. Sety, now in the Summers estate.

III

Mr Sety has not obtained a permit for storage of the tires from the Northeast Tri-County Health District. nor has he complied with substantive solid waste requirements: including: 1) Controling access to the ture pile by fencing, and 2) providing on-site fire control equipment.

IV

There have been several fires at the property in question from 1979 through 1992; and notices of violation and penalty orders in 1984, and in 1992. The 1984 notice of violation and penalty were apparently never received by Mr. Sety. Letters from the Department of Ecology to Mr. Joseph Sety were sent in 1988 and 1989. Two letters from the Tri-County Health Dept. to Joe Sety were sent in 1992 regarding an application for a solid waste permit, which was never completed.

V

The fire at issue occurred on February 7, 1992. Phil Lienart of DOE was contacted by the Stevens County Sheriff's Department at 12.45 a.m. that a tire fire was burning approximately two miles south of Chewelah at the Sety property. Lienhart and Ecology Inspector Gregory Flibbert arrived at the site almost simultaneously with Herb Zibell, Chewelah Fire Department Chief, who reported the fire department had been on site from approximately 12.10 a.m. until 3.30 a.m., February 7, 1992.

VI

The firemen determined the fire was uncontrolable, and decided to let it burn. The fire was approximately 150 feet wide at the north boundary, 50 feet wide at the south boundary, and 250 feet in length. The area outside the center was generating dense smoke.

VII

The inspection by Flibbert and Lienart lasted until approximately 1.30 p.m. Pictures were taken of the fire during the inspection. Dan Spencer of the Valley Fire Department responded to the fire before the Chewelah Fire Dept. and reported the fire started as a grass fire.

VIII

On February 4, 1992, at 3.00 p.m. the Department of Ecology called a forecast stage air pollution episode for all counties of eastern Washington. The episode was expanded to cover all of Washington on February 5, 1992, at 10:00 a.m. It was lifted at 4:00 p.m. February 7, 1992.

IX

RCW 70.94.775(2) prohibits open burning during any stage of an air pollution episode.

X

The February 7, 1992 tire fire was first reported at 12:45 a.m. on February 7, 1992, before the episode was lifted. The property owners, Joe Sety Jr. and Robert Summers, were considered to be in violation of RCW 70.94 775(2).

XI

The fire was still burning on February 12, 1992 and still generating large quantities of dense smoke. Tire fires have occurred in 1979 and 1984 at this location. Mr. Sety was notified at the time of the 1979 tire fire and again on June 22, 1987 that burning tires was prohibited; and on March 8, 1988, that the Washington Administrative Code (WAC) 173-304-420(4) requires actions to be taken to minimize fire potential at tire storage facilities. Since no actions, as outlined in WAC 173-304-420(4) had been taken to minimize fire potential at the tire storage facility, the Dept. of Ecology found the property owners responsible for the fire started February 7, 1992, and were considered to be in violation of RCW 70.84.775(1). The Notice of Violation was sent February 14, 1992.

XII

Joe Sety was responsible for storage of vehicle tires at the site of the fire. The fire had significant potential to degrade air quality in the Chewelah area because of the state-designated eastern Washington forecast stage air pollution episode. RCW 70.94 775 states in part: "No person shall cause or allow any outdoor fire: (1) containing garbage, dead animals, asphalt, petroleum products, paints, rubber products, plastics, or any other substance other than natural vegetation that normally emits dense smoke or obnoxious odors." The penalty assessed for the alleged violation was set at $9,500.

XIII

The $9,500 penalty was set by considering nature of the violation, prior behavior of the violator and actions taken to solve problems resulting in the enforcement action. This fire burned for 5 days, emitting noxious, dense smoke, the entire time. Ecology is authorized to issue penalties up to $10,000 per day per violation.

There were several fires on this site from the late 1970s until this past year. Mr. Sety had been warned by letter, phone and in person. Mr. Sety has not taken action to minimize risk of fire.

XIV

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board issues these:

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these matters. Chapters 43.21B RCW and 70.94 RCW.

II

RCW 70.94.430 and 431 provide for criminal and civil penalties for violations of regulations implementing the state Clean Air Act. Each violation is a separate and distinct offense.

III

Under 70.94.431 RCW (1) . . . "Any person who fails to take action as specified by an order issued pursuant to this Chapter shall be liable for a civil penalty of not more than ten thousand dollars for each day of noncompliance."

IV

The purpose of the Clean Air Act is both "prevention and control" of air pollution. RCW 70.94 011. The civil penalty section fits into the program established to these ends as a means for influencing behavior of the violator.

On considering the amount of an air pollution penalty, the Board is guided by several factors bearing on its reasonableness including:

1) The nature of the offense;

2) The prior behavior of the violator;

3) Actions taken by the violator to correct the problem.

V

The nature of the offense involves both the gravity of the violation and the circumstances of its occurrence. The Board concludes that the five-day fire which started February 7, 1992, at the Sety-Summers property, emitted dense, noxious smoke as rubber tires burned, and was a serious violation of air pollution regulations. The violation was aggravated by its duration.

VI

The prior behavior of the violator in this instance also points toward the amount of the penalty After several fires on this site from 1979, there had been no substantial effort to prevent fires occurring or to become interested or actively involved in preventing further violations.

VII

Mr. Sety did not take the steps required to minimize future fire hazards at the tire site. He did not obtain a solid waste permit; nor did he fence the area to control access to the tire

pile, or provide on-site fire control equipment such as: extinguishers, ample water supply under pressure, and adequate hoses.

Under these circumstances and in the light of the serious nature of the offense, and the long history of such violations, we do not believe there were adequate efforts at solving, preventing or dealing with the problems to call for a reduction of the penalty.

VIII

We conclude that the $9,500 penalty is reasonable, and that it should be upheld. We understand that the Department of Ecology is working with Mr. Sety at its expense, to remove the tires under a "Letter of Agreement."

IX

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From the foregoing, the Board issues this:

ORDER

Notice of Penalty No. DE 92-AQ-E121 issued by the Department of Ecology to Mr. Joseph Sety Jr., is affirmed.

DONE this 18th day of May, 1993.

POLLUTION CONTROL HEARINGS BOARD

HAROLD S ZIMMERMAN, Presiding

ROBERT V. JENSEN, Attorney Member

RICHARD C. KELLEY, Member

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